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Supreme Court, U.S.
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No. 04-1402

In the Supreme Court of the United States

ESTATE OF CHRISTOPHER A. MORELAND, Deceased
by GARY R. MORELAND and LINDA TUTTLE,
Co-Personal Representatives, et al.,
Petitioners,

v.

JOSEPH SPEYBROECK, in his individual and official capacities, Sheriff of St. Joseph County,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAVID E. BALLARD
Counsel of Record

JAMES F. GROVES
LEE & GROVES, P.A.
205 W. JEFFERSON BLVD.
SUITE 502
SOUTH BEND, IN 46601
(574) 232-5923

Counsel for Respondent

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED FOR REVIEW

Respondent, Joseph Speybroeck, Sheriff of St. Joseph County, Indiana, respectfully disagrees with the Petitioner's presentation of the question in the Petition for Certiorari, and would present the question as follows:

(1) Did the Court of Appeals for the Seventh Circuit reversibly err in affirming the District Court's grant of summary judgment in favor of Sheriff Joseph Speybroeck in his official capacity on Moreland's §1983 claim, where Moreland offered no evidence that the Sheriff maintained a policy or custom that was deliberately indifferent to the needs of pre-trial detainees, or to Moreland specifically?

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STATEMENT OF THE CASE

1. Overview of the Evidence

Joseph E. Speybroeck was the Sheriff of St. Joseph County, Indiana, on October 25, 1997, the morning Christopher Moreland was arrested and brought to the St. Joseph County Jail. It is undisputed that Sheriff Speybroeck was not present at the jail during any of the events that gave rise to the complaint in this case. It is also undisputed that he did not personally direct or participate in any of the conduct that resulted in Moreland's death.

It is undisputed that Sheriff Speybroeck had in place jail policies and procedures based upon the American Correctional Association Guidelines for Adult Detention Facilities, updated annually pursuant to Indiana law, and that all corrections officers were trained in the use of force at the Indiana Law Enforcement Academy. Each of the officers involved received training in compliance with Indiana law, and more training than what was required by the Indiana Law Enforcement Training Board. Moreland offered no evidence as to the training the officers received, additional training that should have been received, or how the training in this case was deficient.

In addition, Moreland's experts acknowledged that the sheriff had adequate policies in place with regard to the use of OC-10 pepper spray, and that the training for its use was sufficient. While one expert gave the opinion that the spray was improperly used against Moreland, he gave no evidence of a policy or custom of improper use. Moreland's experts also acknowledged a proper written policy with regard to a restraint chair, which the jail corrections officers were personally trained with regard to its use. Again, while

Moreland's expert gave the opinion that the restraint chair was improperly used against Moreland, he gave no evidence of a policy or custom of improper use, a pattern of improper use, or how much training the jail officers received or should have received in its use.

Finally, it is also undisputed that Sheriff Speybroeck had in force a contract for 24-hour onsite medical services at the jail staffed by qualified medical personnel in order to provide medical care for detainees. Moreland's expert acknowledged that Sheriff Speybroeck had an adequate jail policy in place permitting jail personnel to call for an ambulance and have anyone requiring medical attention to be transported to the hospital. Moreland's expert gave the opinion that the policy simply was not followed the morning Moreland was injured. The expert provided no evidence that there were other occasions where this occurred, or that Sheriff Speybroeck had any knowledge that jail personnel at any time were not following the policy. Moreland also offered no evidence as to the particular training received by jail personnel, any lack of training with regard to the provision of medical care, or whether another medical emergency had ever occurred before at the jail.

2. Moreland Has Omitted a Key Factor.

Moreland has failed to reveal to this Court that the reason the Seventh Circuit Court of Appeals affirmed summary judgment below was because Moreland's appellate brief failed to offer any support for his argument. In a 3-0 opinion, the Court of Appeals held: "In their opening brief to this court, the plaintiffs failed to discuss the facts relevant to their claim against the sheriff, relying instead almost entirely on a series of string citations to affidavits and other documents in the record. . . . Perfunctory or undeveloped arguments are

waived." *Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir.2005) (citations omitted).

Moreland's claim against Sheriff Speybroeck in his official capacity was that the sheriff was deliberately indifferent with regard to training in the use of force or in providing medical care, by maintaining a widespread practice of unconstitutional conduct that amounted to a policy or custom. Yet nowhere in Moreland's Statement of Facts in his appellate brief did Moreland present any facts identifying what training was received, what training should have been given, what policies were in effect, what "custom or policy" was being maintained, or the level of awareness Sheriff Speybroeck had of anything. Nothing in the Statement of Facts mentioned the evidence offered to oppose summary judgment, or even specified what the claim against the sheriff was. In fact, nowhere in the Statement of Facts were the words "sheriff" or "Speybroeck" even used (except to identify Sergeant Paul Moffa, who was not a party to the appeal, as "the Sheriff Speybroeck's shift supervisor").

In addition, the Argument within Moreland's brief consisted almost entirely of the following type of references to the record: ". . . the following summary judgment response materials specifically address deliberate indifference to medical needs (Exh G, Zentz testimony, pp 17-18; Apx. pp 407-408; Exh K, Gruler, pp 18, 22-23; Apx. pp 517, 521-522; Exh K, King, pp 7-20 . . ." This list of summary judgment exhibits did not explain what facts were contained therein, how the exhibits were relevant, or how they constituted an issue of fact justifying reversal of summary judgment. "We will not scour a record to locate evidence supporting a party's legal argument." *Id.*

The Court of Appeals below graciously allowed Moreland to file an additional brief *after* oral argument. Even so, Moreland still offered no evidence of any policy or custom. The Court of Appeals concluded: "Even if the initial underdeveloped argument is not construed as a waiver, the evidence is insufficient to raise a jury question on the plaintiffs' claims against the sheriff." *Id.*

3. Moreland Has Exaggerated the Record.

Although Moreland's experts gave conclusory opinions that "no well-trained officer" would do what the particular deputies were alleged to have done, no evidence was offered as to what training was received, or what training should have been received, with regard to the pepper spray, the restraint chair, or the use of force.

There was no evidence presented of a custom or practice of abusing the pepper spray, either using it solely for verbal altercations, or spraying detainees while strapped in the restraint chair. Moreland presented only one instance of a detainee being sprayed while in the restraint chair, where an inmate had partially broken free and the officers warned that they would spray him if he didn't stop spitting in their faces ("battery to police with body waste") as they attempted to secure him.

Finally, there was no evidence offered of a "code of silence," ongoing violations of any of the jail policies, or a routine misuse of force. None of these references appeared in the materials offered to oppose summary judgment.

As for the claim of lack of medical training, Moreland has taken isolated comments out of context, an issue the Court of Appeals specifically addressed during oral argument.

Moreland presented no evidence of the training received with regard to medical attention, let alone how it was deficient. It is not true that no one at the jail understood how to obtain medical treatment for somebody – Moreland's references to statements by nurses are actually references to the medical defendants who had already settled and had been dismissed from the case.

The Court of Appeals undertook a comprehensive review of the evidence that was considered for summary judgment, and it unanimously concluded that Moreland simply failed to produce any evidence of a custom or policy.

REASONS FOR DENYING THE WRIT

1. Moreland Has Given No Compelling Reason to Justify Discretionary Review by this Court.

Moreland stresses as his compelling reason the collection of damages from "a source to satisfy the jury's award" (Petition, p. 10). This is another way of asserting *respondeat superior* liability against the sheriff, in direct violation of *Monell v Dep't. of Social Services of City of New York*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978).

The unanimous opinion below that Moreland's perfunctory and underdeveloped argument was waived is consistent with the accepted and usual course of judicial proceedings. "However much we may importune lawyers to be brief and to get to the point, we have never suggested that they skip the substance of their argument in order to do so." *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir.2003). "We will not search the record in an effort to determine whether there exists dormant evidence which might require submission of the case to a jury . . .

Judges are not like pigs, hunting for truffles buried in briefs." *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1246 (10th Cir.2003) (citations omitted). The decision below is in accord with decisions from all of the other United States courts of appeals on the same issue.[1]

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[1] *Cruz v. American Airlines, Inc.*, 356 F.3d 320, 333 (D.C.Cir.2004) (appellant required to present, argue, and support his claim in his opening brief before court of appeals will consider it – "We are not self-directed boards of legal inquiry and research . . ."); *Muniz v. Rovira*, 373 F.3d 1, 8 (1st Cir.2004) (issues raised perfunctorily, without developed argumentation, will not be considered on appeal); *State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 172 (2d Cir.2004) (when appellant fails adequately to present arguments in brief, the arguments are abandoned); *Joint Stock Society v. UDV North America, Inc.*, 266 F.3d 164, 178 (3d Cir.2001) (an issue is waived unless a party raises it in its opening brief); *Pleasurecraft Marine Engine Co. v. Thermo Power Corp.*, 272 F.3d 654, 657 (4th Cir.2001) (party abandons on appeal claim by failing to mention it in its opening brief); *Porter v. Ascension Parish School Bd.*, 393 F.3d 608, 613 (5th Cir.2004) (failure adequately to brief the issue of whether summary judgment in favor of defendants in their official capacities should be reversed constitutes waiver of that argument); *Dillery v. City of Sandusky*, 398 F.3d 562, 569 (6th Cir.2005) (issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived); *Anderson v. Larson*, 327 F.3d 762, 771 (8th Cir.2003) (a party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue); *Arredondo v. Ortiz*, 365 F.3d 778, 781 (9th Cir.2004) (bare assertion in brief that reasonable jurors could reach a certain conclusion is not an argument, let alone a developed argument; an issue simply mentioned but not argued will not be considered); *Dick v. Phone Directories Co., Inc.*, 397 F.3d 1256, 1267 (10th Cir.2005) (court of appeals will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim); *Access Now, Inc. v.*

As for Moreland's claim of inadequate training, the Seventh Circuit recently summarized in *Dunn v. City of Elgin, Illinois*, 347 F.3d 641, 645-46 (7th Cir.2003):

> A municipality can be found liable under § 1983 if the municipality itself causes the constitutional violation. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). One example of this is where the municipality fails to provide adequate police training. However, "inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). Deliberate indifference may be shown in one of two ways. First, a municipality shows deliberate indifference when it fails to train its employees to handle a recurring situation that presents an obvious potential for a constitutional violation and this failure to train results in a constitutional violation. *See Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 409, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). Second, a municipality shows deliberate indifference if it fails to provide further training after learning of a

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Southwest Airlines, Co., 385 F.3d 1324, 1330 (11th Cir.2004) (legal claim or argument that has not been briefed other than directing the court of appeals to evidence submitted to the district court is deemed abandoned and its merits will not be addressed); *Engdahl v. Department of Navy*, 900 F.2d 1572, 1576 (Fed.Cir.1990) (court of appeals will not consider argument for which no citations to the record were provided).

pattern of constitutional violations by the police. *See Palmquist v. Selvik,* 111 F.3d 1332, 1346 (7th Cir.1997).

Moreland presented no evidence of a recurring situation, a pattern of constitutional violations, or of a failure to train with regard to either. Moreland presented no evidence of Sheriff Speybroeck's awareness of anything – in fact, Moreland's counsel did not even take his deposition.

Finally, the proposition that a single violation of federal rights can trigger §1983 liability under *Monell*, if the violation was a "highly predictable consequence" of the failure to act, still "does not relieve the plaintiff from the requirement of showing that an unconstitutional policy, custom, or practice existed at the time the plaintiff's rights were violated." *Moreland, supra* at 760. There still must be, as there was in the case Moreland cites, *Brown v. Bryan County*, 219 F.3d 450 (5th Cir.2000), evidence of what training there was (or wasn't) and how it contributed to the result (the sheriff in *Brown* admitted the reserve deputy had received *no* training).

Moreland offered no evidence of what training was received, either medical or in the use of force, and further identified no deficiency in (and certainly no absence of) training in any aspect. A unanimous Court of Appeals below concluded that it was the absence of such evidence that failed to raise a jury question on the official capacity claim against the sheriff. As both the District Court and the Court of Appeals confirmed after reviewing the entire record submitted on summary judgment, Moreland simply failed to offer any evidence of a policy, custom or practice of any behavior at all, let alone unconstitutional behavior.

CONCLUSION

Moreland has raised no important federal question or important matter – the Petition seeks only a third review of the same record, tantamount to a claim that both courts below misapplied properly stated rules of law.

For the foregoing reasons, respondent respectfully requests that this Honorable Court deny the Petition for Certiorari.

Respectfully submitted,

David E. Ballard
Counsel of Record
James F. Groves
Lee & Groves, P.A.
205 W. Jefferson Blvd., Suite 502
South Bend, IN 46601
(574) 232-5923
Fax (574) 232-5942
Counsel for Respondent